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Protecting your client's privacy in discovery

BE PREPARED TO KEEP YOUR CLIENT'S IRRELEVANT PERSONAL HISTORY OUT OF DISCOVERY WHENEVER POSSIBLE; THAT FELONY CONVICTION, HOWEVER, MAY BE A BRIDGE TOO FAR

As we are all aware, protecting your clients' privacy throughout discovery can be tantamount to obtaining a decent result for them. These waters can be turbulent and tricky to navigate. This article will focus on the more commonly encountered privacy concerns inclusive of *sub rosa* on your client and how to handle it throughout litigation.

Client's criminal history

This is an interesting topic and has differing points of practice when it comes to properly handling and protecting your client in discovery. The main question concerning your client's criminal past comes in the Form Interrogatory 2.8.

"Have you ever been convicted of a felony? If so, for each conviction state;

(a) the city and state where you were convicted;

(b) the date of conviction;

(c) the offense; and

(d) the court and case number

In most cases, a "No" answer is appropriate, however, on occasion we run into a client with prior felonies. Clearly, all criminal acts are not felonies, so make sure to ask your client and research what they were actually convicted of. You don't want to disclose a misdemeanor mistakenly.

If your client does have a felony, ask them what the felony was for, and when they were convicted. Generally, discovery is limited to 10 years, thus in order to protect your client in written discovery, if their conviction was over 10 years ago, a proper objection will buy you some time. I would pose an objection as follows: "Objection, relevance and privacy. Subject to that objection, Plaintiff has no felony convictions in the past 10 years." This response may or may not bring on a meet and confer and eventual motion to compel.

Keep in mind, disclosure of a felony does not mean the crime can be brought up at trial. More likely than not, the felony, as long as it was not a crime of moral turpitude, will not be admissible. So use your judgment as to what the felony was, the likelihood of it being brought up at trial and the effect to your client. If you fight this and bring on a motion to compel, you will risk being sanctioned, so weigh the benefits versus the costs heavily. For example, a felonious DUI conviction will most likely be blocked at trial, so even if it occurred 15 years prior, it may not be worth the fight.

Unfortunately, when it comes to felonies involving crimes of moral turpitude, they are relevant and could be used against your client at trial. If your client was convicted of fraud the defense will attack their credibility, so it may be beneficial to fight off its disclosure as long as possible.

I have found that roughly 50 percent of defense lawyers ask my clients if they have had previous felonies in deposition. When asked, I immediately object and limit their question to 10 years, and rarely do I get any disagreement. If counsel continues to press the question it usually means they already know my client has a felony. At this point, I take a break and tell my client to disclose what occurred – however, I make a record of how the crime is not relevant and will not be admissible at trial. I can at least use the transcript in my later motion in limine if needed.

Of course, if your client had a felony within the last 10 years, no matter what the nature, you will have to disclose it in written discovery as well as deposition. You can still make a record regarding admissibility and relevance if applicable.

Juvenile criminal records

As a general rule, a party's juvenile court record is confidential and a court order would be necessary to release it to third parties (Welf. & Inst. Code, § 827). However, this is not an absolute privilege and the records may be discoverable under appropriate conditions.

If the records are relevant to the present litigation, they can be obtained. For example, if you are alleging a brain injury that causes your client to act aggressively, his juvenile records showing pre-injury aggression would be relevant. (*Navajo Express v. Sup.Ct.* (*Russo*) (1986) 186 Cal.3d 981, 986.)

Client's sexual past

A party's sexual practices are protected by the California Constitution's right of privacy. (Cal. Const. Art. I, § 1; *Vinson v. Sup.Ct.* (*Peralta Comm. College Dist.*) (1987).)

The right to privacy is not absolute and must be balanced against other important interests. Any compelled disclosure however, "Must be narrowly drawn to assure maximum protection of the constitutional interests at stake." (*John B. v. Sup.Ct.* (*Bridget B.*), *supra*, 38 Cal.4th at 1200. [where wife alleged husband infected her with AIDS, discovery of husband's sexual history limited to date when husband could have been first infected through date when couple last had sexual relations.].)

In sexual-harassment cases, a claim for emotional distress may waive your client's privacy as to his or her present mental or emotional condition – for purposes of a mental exam. However, such emotional-distress claims do *not* waive your client's privacy when it comes to their own past or present sexual practices,

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absent any damage to his or her present sexuality.

Medical and psychological history

Medical History

Generally, in personal-injury cases, the plaintiff waives the physician-patient privilege (Evid. Code, § 996). However, the Plaintiff does have a right of privacy in his or her medical records. The disclosure needs to be balanced between the need for discovery and the need for confidentiality. Discovery of relevant medical history is allowed – i.e., prior orthopedic visits on a spinal injury case. However, a woman's OB-GYN history could arguably be not relevant. (*Palay v. Sup.Ct* (1993) 18 CA4th 919, 933-934.) However, this does not allow the defense to dig into a lifetime of medical history. Our client's right of privacy is protected as to physical and mental conditions unrelated to the claim. (*Britt v. Sup. Ct* (1978) 20 C3d 844, 864.)

Communications between patient and psychotherapist

Confidential communications between a patient and his or her psychotherapist are protected both by statutory privilege (Evid. Code, § 1014) and by the patient's constitutional right of privacy. (*Roe v. Sup. Ct., supra*, 229 Cal.3d at 837.)

In general, parties are not entitled to delve into an opponent's mental condition unless the opponent puts that condition directly in issue. This most commonly occurs when an injured plaintiff seeks compensation by way of damages for harm allegedly caused, and the only way to test that claim is to pierce any associated right to privacy. (See, e.g., *Vinson v. Superior Court* (1987) 43 Cal.3d 833.) However, good cause must still be shown to dip into a party's psychological matrix. (See *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1886-1887.)

In essence, plaintiffs need to limit their claim to foreseeable garden-variety pain and suffering arising out of physical injuries; if not they will voluntarily waive the right to privacy relating to their mental state. In other words, they cannot claim a detrimental change to their mental condition in a complaint and keep defendants from assessing their mental condition before and after the incident.

If your client truly does have "severe" emotional distress from the accident or injury sustained you will need to have a lengthy discussion with them about their mental-health past. Opening the door to past mental health may be a dead end or a horrible mistake. You need to discuss and make sure your client is not hiding any skeletons of past abuse or mental-health issues that will damage your claim for severe emotional distress.

If you have alleged a claim for severe emotional distress in your complaint and the client later wishes to retract those claims, this can easily be accomplished through a stipulation with the defense that your client does not wish to pursue any emotional distress claim above and beyond what would normally be associated with this type of injury. (Generally, *Davis v. Sup. Ct.* (*Williams*) (1992) 7 Cal.4th 1008, 1016.)

Sub rosa surveillance video

As we all know, particularly on our larger cases, the defense is following our clients around and filming them during their day-to-day activities. When it comes to discovery, many plaintiff attorneys fail to adequately use the tools available to obtain this video in advance of trial. *Sub rosa* video as well as the testimony of the investigator is subject to discovery in California.

The law on point states that photographs and films of our clients is subject to discovery and *not* protected by the attorney-client or work-product privilege. (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166.) This discovery is set forth in Form Interrogatory 13.1 and 13.2 – demanding disclosure of the who, what, when of the surveillance conducted. As you approach trial it is always important to send supplemental discovery inclusive of 13.1 and 13.2 to make sure that *sub rosa* has been disclosed. Defendant's failure to properly disclose this information can help to effectively block it at trial.

In addition to the 13.0 series, I would advise serving special interrogatories and production requests seeking all *sub rosa* evidence obtained by the defense.

More likely than not, you will obtain objections to the 13.0 series, special interrogatory and production requests. Typically, defendants will claim some sort of privilege and object. It is critical that you meet and confer on this issue in a timely manner, both after your initial sets of discovery and after your supplemental. If the defense fails to provide you with the information requested you must file a motion to compel it.

As discussed above, the attorney-client privilege and work-product privilege objections fail under *Suezaki*. The reasoning of the court in *Suezaki* was that since the plaintiff is doing the filmed activities, there is no confidentiality at play. Furthermore, it is the Plaintiff's representations in the video, not the mental impressions of the defense team – voiding the work-product argument. The court further reasoned that disclosure of *sub rosa*, (1) Protected against surprise; and (2) Allowed the other party for an examination of their person who performed the surveillance.

Another important point to be aware of is the fact that Defendants can continue to obtain *sub rosa* after discovery closes, and even during trial. If you have properly demanded and performed meet and confers on the issues throughout litigation, a judge will be more apt to allow you to obtain a deposition and or production of said *sub rosa* after discovery closes or even during trial. Diligence is key to thwarting the defense's use of this damaging tactic.

If you failed to be proactive during litigation, you will need to do some damage control at deposition and definitely at trial. The rules are straightforward when it comes to using the video as impeachment against your client. During deposition and trial preparation I go to great lengths to caution my clients about questions that are a little "too specific." I tell them that questions like "Have you ever jogged around your block?" "Have you ever jumped rope with your grandson?" "Have you ever carried a 12-pack of beer inside of your home?" mean that

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they already have video of you doing those activities. I warn them that if they are presented with specific activity questions, they need to respond with saying either, "Yes, I did that once and I was in pain for 3 days after" or, "I don't recall if I did that or not." An unequivocal "NO" response to these questions is what triggers the use of the *sub rosa* at trial.

Obviously the most useful tactic will be to obtain what the defense has on your client, but proper preparation can also prevent the use of *sub rosa* against your client at trial, or at least lessen the impact.

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